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No. 86-840

In The
Supreme Court of the United States
October Term, 1986

ROZAY'S TRANSFER, A CALIFORNIA CORPORATION,

Petitioner,

vs.

SOUTHWEST ADMINISTRATORS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In light of the provisions of 29 U.S.C. § 186(c)(5)(B), requiring that trust contributions be made only pursuant to the terms of a written agreement, is it a valid defense to a trust fund's collection action that an employer who knew that the terms of the written labor agreement required trust contributions relied on oral representations by a union official that the express terms of the agreement would not be enforced?

2. Where the union has previously filed unfair labor practice charges against an employer for failure to make pension contributions and the employer and the union subsequently enter into a collective bargaining agreement requiring that contributions be made for the disputed period, and simultaneously execute a side agreement that the union's unfair labor practice charges will be dismissed, may the employer rely on oral representations by the union that are at variance with both the collective bargaining agreement and the side agreement to defeat an action by the trust fund to enforce the terms of the collective bargaining agreement?

3. When an employer knows, shortly after signing a written collective bargaining agreement, that a union official's oral representations that the agreement would not be enforced as written were false, but nonetheless operates under the agreement for its full term, is the trust fund's right to enforce the written terms of the agreement defeated because the employer later successfully sues to rescind the contract based on oral misrepresentations by the union?

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The Respondent, Southwest Administrators, Inc., respectfully submits the following Opposition to Petitioner's Request for a Writ of Certiorari.

OPINIONS BELOW

On May 22, 1985, the Honorable Marianna R. Pfaelzer, United States Central District of California, entered Find-

ings of Fact and Conclusions of Law. (Petition for Certiorari (hereinafter "Petition"), App. B, pp. A-9 to A-23).

On June 3, 1985, Judge Pfaelzer entered supplemental Findings of Fact and Conclusions of Law. (Petition App. C, pp. A-24 to A-27).

The decision by Judge Pfaelzer was affirmed by the Court of Appeals for the Ninth Circuit on June 10, 1986. The court amended its opinion on August 28, 1986. The opinion, as amended, is published in *Southwest Administrators, Inc. v. Rozay's Transfer,* 791 F.2d 769 (9th Cir. 1986).

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JURISDICTION

Respondent adopts the statement of Petitioner.

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STATUTES INVOLVED

Respondent adopts the statement of Petitioner.

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STATEMENT OF THE CASE

The Respondent has no substantial dispute with Petitioner's description of the actions by the Petitioner ("Rozay's") and Local 208 (the "union") through the time when the union contacted the Western Conference of

Teamsters Pension Trust Fund (hereinafter "Trust Fund"). After Rozay's 1978 to 1981 contract with the union expired, it continued to make trust contributions until June of 1982. Beginning in July of 1982, Rozay's stopped making contributions, although the parties had not yet reached an impasse in bargaining. 791 F.2d 769, 771. The union filed unfair labor practice charges alleging, *inter alia*, that Rozay's cessation of contributions violated 29 U.S.C. § 158(a)(5). 791 F.2d at 775. The parties then met and tentatively agreed to a new contract for the 1981 to 1984 term that required trust contributions but gave Rozay's some concessions in other areas. (Petition, App. B, p. A-16). Rozay's asked to be relieved from its obligation to make trust contributions from July, 1982 through the date the agreement was to be signed. The union representatives explained that such a waiver was against trust fund policy, but was not unprecedented. The union agreed to write to the Trust and seek a waiver. 791 F.2d at 771, 772.

The Petitioner substantially misstates the subsequent actions by the parties, and particularly by the Trust Fund. On January 26, 1983, Archie Murrietta, the president of Teamsters Local 208, wrote to the Trust Fund requesting that Rozay's be relieved from paying pension contributions for the months of July, 1982 through January, 1983. (Petition App. B, p. A-17). Apparently, Rozay's never contacted the Trust Fund to request a waiver. In early March of 1983, Murrietta spoke to an administrator of the Trust Fund at a social gathering and was advised that the trustees had voted to deny his request. (Petition App. F, p. A-74). A formal written notice of denial was sub-

sequently issued and on March 24, 1984, was mailed to Murrietta and Rozay's. (Petition, App. F, p. A-76).

On March 8, 1983, Mr. Murrietta and Mr. William Rozay signed the collective bargaining agreement. Mr. Murrietta did not advise Rozay's that the trust had denied Murrietta's request for a waiver of the July, 1982 to January, 1983 contributions.

When Mr. Rozay signed the collective bargaining agreement, he was aware that it expressly provided for pension contributions from October 1, 1981 through September 30, 1984. (791 F.2d at 774). He nonetheless signed the agreement because he was relying on Murrietta's oral representations that the written terms of the agreements were not likely to be enforced. (791 F.2d at 774-775).

Neither court below suggested that there was any impropriety by the Trust Fund. There is no evidence that the Trust was aware of the status of negotiations between Local 208 and Rozay's or that any Trust employees had reason to believe that Murrietta would fail to advise Rozay's of the trustees' decision. The trial court's Findings of Fact stated, "[t]he fraud was therefore not committed by the Trust Fund . . ." (Petition, App. B, pp. A-21, A-22).

The trial judge, who vocally disapproved of Murrietta's failure to advise Rozay's of the trustees' decision, stated, "this is no reflection . . . on the trust fund. Do you understand that?" (Petition, App. A, p. A-8).

Although Rozay's was notified on March 24, 1983 that the Trust would not waive contributions owed under the terms of the written agreement, Rozay's took no action to rescind the collective bargaining agreement. On June 20, 1983, Southwest Administrators, Inc. filed this action

to collect trust contributions owed for July, 1982, through March, 1983. (Petition, App. F, p. A-77).

After this action was pending for over one year, Rozay's moved to join Local 208 as a third party defendant. (Petition App. F, p. A-77). When that motion was denied, and after the term of the contract had expired, Rozay's initiated an independent action against Local 208 to rescind its collective bargaining agreement based on the alleged fraud by the Local. 791 F.2d at 777, n.4. On June 20, 1986, the District Court entered an order rescinding the collective bargaining agreement. (Petition App. F, p. A-83). The Court of Appeals held that the subsequent rescission of the collective bargaining agreement had no effect on the Trust Fund's right to collect the contributions owed by Rozay's for the months of July, 1982 through March, 1983.

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LEGAL ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

The central question raised in this Petition for Certiorari is whether an employer whose president signed a collective bargaining agreement and understood its terms may avoid the provisions requiring trust contributions because a union official orally represented that the trust provisions would not be enforced as written.

Pursuant to § 302(c)(5)(B) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5)(B), the employer's obligation to make trust contributions must be defined in a "detailed

written agreement." As a result, courts have uniformly held in trust collection actions that an employer's obligations under a written agreement cannot be altered by contrary oral representations.

The Petitioner asserts that decisions by the Courts of Appeal of the Seventh Circuit and Sixth Circuit conflict with the decision below. But there is no such conflict. The Seventh Circuit decision holds that where the employer never received a contract and was not aware of its terms, no contract was formed because there was no mutual assent. In the instant case, the employer was fully aware of the terms of the contract when he signed it, but alleged that he was not bound because the union orally represented that the terms would not be enforced. Courts of the Seventh Circuit have determined that the decision cited by the Petitioner does not apply under these facts.

The decision by the Sixth Circuit Court of Appeals enforced a written side agreement, but expressly stated that oral side agreements, such as the one relied upon by the Petitioner, are proscribed by statute.

Finally, to protect trust fund beneficiaries by enforcing the written collective bargaining agreement is consistent with the decisions in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960), and *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 70 L.Ed.2d 833, 102 S.Ct. 851 (1982).

A. The Labor Management Relations Act of 1947, § 302, Prohibits The Enforcement of Oral Representations Regarding Trust Contributions

Enforcement of alleged oral promises by the union, rather than the written terms of the collective bargaining

agreement, would violate § 302 of the Labor Management Relations Act. 29 U.S.C. § 302. The Taft-Hartley Act makes unlawful all payments by employers to unions or to trust funds, subject only to very narrow exceptions. LMRA § 302(a), (c), 29 U.S.C. § 186(a), (c). The Act provides that payments to trust funds will be permitted only if "the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . ." 29 U.S.C. § 186(c)(5)(B). No contributions may be paid or benefits distributed in the absence of such a detailed agreement. *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969).

The purpose of § 302(c)(5)(B) is to "prevent collusive or fraudulent side arrangements between employers and union representatives" by providing that there must be a clear written statement of the rights and benefits available to the individual union members. *Lewis v. Seanor Coal Company*, 382 F.2d 437, 443 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968).

Permitting an employer to enforce oral modifications to the express written terms of the agreement would profoundly undercut protections created by § 302(c)(5)(B). In *Seanor Coal Company*, the Court of Appeals for the Third Circuit carefully reviewed the purposes of § 302(c)(5)(B) and concluded that it could not enforce alleged oral side agreements that reduced the employer's obligation to make trust contributions. *Seanor Coal Company* has been followed by courts in several circuits. *Abbate v. Browning-Ferris Industries of Elizabeth, New Jersey, Inc.*, 767 F.2d 52 (3d Cir. 1985), *San Pedro Fishermen's Welfare Trust Fund Local 33 v. Di Bernardo*, 664 F.2d

1344 (9th Cir. 1982), *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2d Cir. 1968); *Nachwalter v. Christie*, 611 F.Supp. 655 (S.D. Fla. 1985). No contrary authority has been cited by the Petitioner or located by the Respondent. The Ninth Circuit has repeatedly followed *Seanor*. *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981), *later appeal*, 767 F.2d 589 (9th Cir. 1985), *cert. denied*, — U.S. —, 89 L.Ed.2d 601 (1986); *Operating Engineers Pension Trust v. Giorgi*, 788 F.2d 620 *amended opinion*, 122 LRRM 3069 (9th Cir. 1986); *Maxwell v. Lucky Construction Co., Inc.*, 710 F.2d 1395, 1397-98 (9th Cir. 1983).

Enforcing only the written terms is essential to protect the interests of the union workers who are the trust beneficiaries. Employees have a right to know if the obligation to make contributions into the fund is modified. *Lewis v. Seanor Coal Company*, 382 F.2d at 443. If oral modifications to the express terms of trust agreements by the employer and union were permitted, "[e]mployees, basing their futures on the promises of an old-age pension provided in a union contract, may discover in later years to their surprise that an oral side-agreement had eroded the worth of their pension rights." *Waggoner v. Dallaire*, 649 F.2d at 1366.

The contrary rule would create enormous uncertainty. Employees might be led to remain at their jobs in reliance on the benefits promised in the written agreement, although an oral side agreement excused the contributions with which to fund the benefits. *Seanor Coal Company*, 382 F.2d at 443. The employer's competitors would be unable to determine a competitive compensation package because any written benefit scheme could be modified by an oral side agreement. *Id.*, 382 F.2d at 443. The resulting advan-

tages to the employer who joined in such an agreement create an incentive for collusion between the employer and the union at the expense of trust beneficiaries. Thus, any erosion of the strict requirements of § 302(c)(5)(B) could provide "an unintended loophole for the unscrupulous." *Moglia v. Geoghegan*, 403 F.2d at 116.

In *Lewis v. Benedict Coal Co.*, 361 U.S. 459, 469, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960), this Court acknowledged that trust contributions are, in effect, part of the wages included in each employee's individual employment contract. The same opinion established that individual trust beneficiaries should not suffer financial loss because of misdeeds by union leaders. Enforcing oral side agreements which violate § 302(c)(5)(B) would be directly contrary to that express policy. Opinion below, 791 F.2d at 775, n.3.

B. There Is No Conflict Among The Circuits.

1. The Seventh Circuit Decision in Caporale v. Mar Les Is Inapposite Because The Petitioner Understood and Signed The Agreement To Be Enforced.

The decision below in no way conflicts with the decision by the Seventh Circuit in *Caporale v. Mar Les, Inc.*, 656 F.2d 242 (7th Cir. 1981). In *Mar Les*, the employer had never seen a collective bargaining agreement. It signed memoranda of understanding that incorporated by reference other collective bargaining agreements. The employer received no response from the union and neither the union nor the employer conformed their conduct to the collective bargaining agreements. The court found that no trust contributions were owing because there had been no mutual assent to the contract. 656 F.2d at 243 244.

The trial courts in the Seventh Circuit have not treated *Mar Les* as authority for the proposition that an employer who is aware of the express terms of an agreement may rely on fraud by the union to avoid its obligations to the trust fund. In *Chicago District Council of Carpenters Pension Fund v. Dombrowski,* 545 F.Supp. 325 (N.D. Ill. 1985), decided over one year after *Mar Les,* Judge Shadur, without discussing *Mar Les,* granted a trust's motion *in limine* to exclude the employer's evidence of alleged fraud and coercion. The court acknowledged that fraud by the union would render the underlying contract voidable and subject to repudiation, but held that an employer who chose to live with the burdens and benefits of the contract until the trust initiated a collection action could not present the alleged fraud as a defense against the trust. 545 F.Supp. at 328.

In *Thelin v. Mitchell,* 576 F.Supp. 1404 (N.D. Ill. 1983), the court rejected an employer's duress defense that was expressly based on the *Mar Les* decision. The court found that *Mar Les* was distinguishable and was to be narrowly applied: "the decision in *Mar Les* is based upon contract principles of offer and acceptance and was limited to the peculiar circumstances in that case." The *Mitchell* court contrasted *Mar Les* with a situation, such as the instant case, where the documents were signed by both sides simultaneously, the employer knew that he was signing a union agreement, and the document specifically notified the employer of its obligation to make trust contributions. *Thelin v. Mitchell,* 576 F.Supp. at 1408.

Properly analyzed, *Caporale v. Mar Les* stands only for the same proposition accepted by the Ninth Circuit in *Operating Engineers Pension Trust v. Gilliam,* 737

F.2d 1501 (9th Cir. 1984). In *Gilliam*, the Ninth Circuit held that there was no mutual assent, and no contract was formed where the employer was not aware that he was signing a collective bargaining agreement, but thought he was applying only for membership in the union as an owner-operator. The *Gilliam* case is discussed and fully distinguished by the court below. That analysis is equally applicable to *Mar Les*.

Hence, the decisions of the Ninth Circuit are entirely in accord with the decisions of the courts in the Seventh Circuit. If there is no mutual assent to enter into a collective bargaining agreement, and the parties subsequently conduct themselves as though there is no collective bargaining agreement, the trust may not enforce the obligation to contribute. But where the employer's representative is fully aware of the terms of the collective bargaining agreement when he signs it, the employer may not later rely on oral representations by a union official to alter the terms of the written agreement.

2. The Sixth Circuit Court of Appeals Agrees That Oral Side Agreements Are Proscribed.

The Petitioner argues that the decision below conflicts with the recent decision by the Sixth Circuit Court of Appeals in *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098 (6th Cir. 1986). In *Kraftco*, the court enforced a written side agreement that reduced the obligation to pay trust fund contributions that was embodied in the main collective bargaining agreement. There is no conflict between *Kraftco* and the decision below.

The Petitioner's defense relies not on a written side agreement, but on an oral side agreement. There was a written side agreement between Rozay's and the union. That agreement, however, did not reduce the trust obligations stated in the main agreement. The trial court found that "the side-agreement [regarding withdrawing unfair labor practice charges] was entered into based on the terms of the collective bargaining agreement," and that "the language of the . . . collective bargaining agreement clearly states that the retroactive payments are to be made." (Petition App. B, p. A-22). Those two written agreements were applied exactly as written. The unfair labor practice charges were withdrawn, but the employer was also required to pay retroactive trust contributions pursuant to the clear terms of the collective bargaining agreement.

Whereas the *Kraftco* court enforced the terms of a written agreement, Rozay's relies upon an oral representation that the written agreement would not be enforced. In *Kraftco*, the Sixth Circuit Court of Appeals, sitting *en banc*, observed that "*oral* modifications of the agreement . . . are clearly proscribed by § 302(c)(5)." (emphasis in original), 799 F.2d 1111, n. 16. The Sixth and Ninth Circuit courts agree that where the side agreement is oral, it may not be enforced.

C. It Is Consistent With Kaiser Steel Corporation v. Mullins To Reject Defenses Based on Oral Misrepresentations.

In *Lewis v. Benedict Coal Co.*, this Court held that fringe benefit trust funds are a special category of third party beneficiary and are not subject to defenses based

on the union's breach of the labor agreement. 361 U.S. at 468.[1] A limit on the rule of *Benedict Coal* is that a court may not direct that an employer make contributions when the very act of contributing violates other federal laws. *Kaiser Steel Corp. v. Mullins*, 459 U.S. 72, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982).

The Petitioner suggests that the *Kaiser Steel* decision undermines *Benedict Coal* and permits defenses based on oral fraud in the inducement. But significant retrenchment from the *Benedict Coal* standard is foreclosed by the passage, in 1980, of § 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1145.[2] Defenses based on oral misrepresentation are wholly inconsistent with employer obligations under § 515 of ERISA.

The Congressional sponsors of § 515 wanted to assure that trust agreements would be enforced as written. As the sponsors noted, plan actuaries determine the financial soundness of plans, and plan beneficiaries exchange their labor in reliance on the terms of the agreements. 126 Cong. Rec. at 20180 (1980) (colloquy between Sen. Williams and Sen. Matsunaga). To protect these expectations, national pension policy requires that employers who enter into trust agreements not be permitted to repudiate the prom-

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[1] The Petitioner argues that *Benedict Coal* does not apply because the Trust Fund is not an "innocent" third party. But the trial court expressly exonerated the Trust Fund of wrongdoing. Petition, App. A, p. A-9, App. B, pp. A-21, A-22.

[2] Because § 515 requires that every employer who is obligated to make trust contributions under the terms of a collective bargaining agreement "shall [do so] to the extent *not inconsistent with law*" (emphasis added), it did not preclude the defense in *Kaiser Steel* that the contributions themselves were illegal.

ises embodied in the agreements. 126 Cong. Rec. at 23039 (1980) (remarks of Rep. Thompson).

A major goal of § 515 was to simplify and expedite trust collections. 126 Cong. Rec. at 23288 (1980) (remarks of Sen. Williams). Because oral representations are difficult to prove or disprove, entertaining evidence of such agreements invites controversy and collusion and thus complicates, rather than simplifies, trust collections. *San Pedro Fishermen's Welfare Trust Fund v. Di Bernardo, supra*, 664 F.2d at 1345.

The Petitioner argues that it is contrary to national labor policy to hold that the Trust Fund is permitted to enforce the terms of a signed contract that is later rescinded. The opposite is true. Stability and predictability in labor relations is served by providing employers with a clear rule that written agreements will be enforced according to their terms.

The result below is also consistent with *Kaiser Steel*. In the instant case, complying with the terms of the contract was not an illegal act. In fact, it would have been criminal for the parties to define the employer's trust obligations by reference to the oral side agreement. 29 U.S.C. § 186(a) and (b). The decision in *Kaiser Steel* dictates that the employer not be permitted as a defense to rely on an agreement to commit an illegal act.

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CONCLUSION

For the reasons stated, the decision below is not in conflict with the decisions of other courts of appeal or of this Court. Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 23 day of December, 1986.

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